No. 98719-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

SPOKANE COUNTY DISTRICT COURT,
Judge Debra Hayes,
Defendant,

and

GEORGE TAYLOR,
Petitioner.

BRIEF OF WACDL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER GEORGE TAYLOR

Mark B. Middaugh, WSBA #51425
WACDL Amicus Committee
1511 Third Avenue, Suite 503
Seattle, WA 98118
(206) 919-4269
mark@middaughlaw.com

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IDENTITY AND INTEREST OF *AMICUS*

The identity and interest of *amicus* are addressed in the accompanying motion for leave to file an amicus brief.

ISSUE ADDRESSED BY *AMICUS*

Whether a litigant can deprive an opposing party of its right to file a notice of disqualification by asking a judge to make an *ex parte* discretionary ruling in the case.

ARGUMENTS AND AUTHORITY

This Court has long held that a party has a right to file a notice of disqualification after learning which judge is assigned to hear his or her case. The Superior Court departed from this century-old guidance when it held that its *ex parte* ruling on preliminary matters relating to a writ of review constituted a "discretionary ruling" that deprived the Petitioner of his right to file a notice of disqualification.

Although the majority of the Court of Appeals issued no precedential opinion on this issue, *amicus* write to urge this Court not to endorse the legal theory that an *ex parte* motion can be used as a legal tool to deprive the opposing party of its right to file a notice of disqualification. Such a ruling would jeopardize a century of precedent and promote improper litigation gamesmanship.

I. THE RIGHT TO DISQUALIFY A SINGLE JUDGE AT THE OUTSET OF PROCEEDINGS IS DEEPLY ROOTED IN WASHINGTON LAW

The right of disqualification is an integral part of the fabric of our state's legal system. The legislature codified the right of disqualification in 1911, and it soon came to be considered a "substantial and valuable right" for litigants. *Harbor Enters., Inc. v. Gudjonsson*, 116 Wn.2d 283, 291, 803 P.2d 798 (1991).

Just eight years after the legislature codified the right of disqualification, this Court was already commenting on its outsize role in legal proceedings. In 1919, this Court wrote that it had "frequently held" that, "upon a showing seasonably made in compliance with the statute, a moving party is entitled to a change of judges as a matter of right." *State ex rel. Dunham v. Superior Court*, 106 Wash. 507, 510, 180 P. 481 (1919) (citation omitted). Three years later, this Court noted that a lawyer performing his "full duty" must first consider disqualification and "secure[s] for the trial of the cause a judge and a jury who are impartial." *State ex rel. Douglas v. Superior Court*, 121 Wash. 611, 614, 209 P. 1097 (1922).

Over the ensuing decades, courts and the legislature worked in tandem to ensure that the right to disqualification remained robust. This

Court noted that the right to disqualification was not always convenient for trial courts, but nonetheless upheld it against challenges:

> The statute's history reflects an accommodation between two important, and at times competing, interests: a party's right to one change of judge without inquiry and the orderly administration of justice. This history also reflects a decision to accord greater weight to the party's right to a change of judge.

Marine Power & Equip. Co., Inc. v. Industrial Indemnity Co., 102 Wn.2d 457, 463, 687 P.2d 202 (1984). This Court summarized its holdings on the topic of disqualification by writing that disqualification has come to assume "predominate importance" in the administration of justice. *Id.*

Indeed, the centrality of the right to disqualification is reflected in the consequences for violating it. Disqualification is viewed as so fundamental to our State's legal system that any error in granting or denying a motion to disqualify is deemed inherently prejudicial. Following the timely filing of a notice of disqualification, the law deems that prejudice exists, and the judge to whom the notice of disqualification is directed no longer has authority to act in the matter. *See State v. Lile*, 188 Wn.2d 766, 781, 398 P.3d 1052 (2017) ("Absent extraordinary circumstances, the prejudice established by RCW 4.12.050 is, in and of itself, *harmful* prejudice.") (emphasis original); *Harbor Enters.*, 116 Wn.2d at 285 (incorrect denial of affidavit led to trial with "no legal

effect"); *State v. Cockrell*, 102 Wn.2d 561, 565, 689 P.2d 32 (1984) (reversing a conviction because once affidavit is filed, "the judge loses all jurisdiction over the case").

In short, the right of disqualification is long-standing and essential to our state's justice system. For over 100 years, criminal defendants, county prosecutors, individual litigants, and major corporations have come to rely on it to secure a fair tribunal for their cases. As a result, any claim that a party has found a loophole or procedural mechanism to deprive his opponent of that right should be viewed with skepticism.

II. THIS COURT HAS CONSISTENTLY INTERPRETED THE RIGHT TO DISQUALIFICATION IN A FLEXIBLE AND PRAGMATIC MANNER

Although the majority opinion in the Court of Appeals declined to issue a precedential opinion relating to RCW 4.12.050, it noted that a "literal reading" of the statute could mean that "the party requesting a new judge need not have been given notice of the matter over which the trial court previously exercised discretion." *State ex rel. Haskell v. District Court (Taylor)*, 13 Wn. App. 2d 573, 582-83, 465 P.3d 343 (2020). The dissent, by contrast, expressed concern that if the Superior Court was correct in its decision to deny the notice of disqualification, then a litigant could be "den[ied] this fundamental right when the opposing party gain[s] an ex parte order at the beginning of litigation before one had any notice

and an opportunity to file a notice of disqualification." *Id.* at 606 (Fearing, J., dissenting).[1]

This Court, however, has not engaged in an unnecessarily "literal reading" of RCW 4.12.050 to deny a party of its right to file a notice of disqualification. Instead, RCW 4.12.050 has consistently been read flexibly, with an eye towards ensuring that each party can file a timely notice without abusing the litigation process.

At the outset, the notice of disqualification statute did not contain a requirement that disqualification be filed prior to a judge making a discretionary ruling. This Court noted that if the statute were "literally construed," then disqualification could occur "any time prior to the entering of the judgment." *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, 316, 118 P. 40 (1911). The Court noted that such an interpretation would be "intolerable" and read into the statute a requirement that any notice of disqualification be filed "orderly and in time." *Id.* at 315-16.

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[1] At least one Court of Appeals decision has held, in contrast to the court below, that *ex parte* rulings do not restrict a party's right to file a notice of disqualification. In *State v. Torres*, 85 Wn.App. 231, 932 P.2d 186 (1997), the State dismissed a case without prejudice after the trial court made numerous discretionary rulings. When the case was refiled, the judge granted an *ex parte* order without notice to the defendant or his attorney. The defendant filed a notice of disqualification. The Court of Appeals determined that the dismissal of the original case terminated the proceeding and the *ex parte* order did not qualify as a discretionary ruling, so the notice of disqualification was timely. *Id.* at 234.

Two decades later, this Court again interpreted the statute with pragmatism and common sense in mind. In *State v. Funk*, 170 Wash. 560, 17 P.2d 11 (1932), a defendant sought to disqualify a judge in a one-judge county on the morning of trial. Although the disqualification was timely within the express language of the statute, this Court ruled that the motion was not permissible. Instead, it held that the "rule of reason should be applied" to prevent litigants from engaging in behavior that would cause "the course of justice [to] be greatly delayed without any valid reason." *Id.* at 564. During this time period, this Court also warned that the disqualification statute must be construed so it does not become "an instrument capable of abuse" that can "unduly hamper superior courts in the administration of justice." *State v. Clark*, 125 Wash. 294, 296, 216 P. 17 (1923).

In *State v. Norman*, 24 Wn. App. 811, 603 P.2d 1280 (1979), Division Three of the Court of Appeals also engaged in pragmatic analysis to permit a technically untimely notice of disqualification. The Court noted that the defendant did not comply with the statute, but found in his favor on the equitable ground that that "the defendant did not have an opportunity to consult with his attorney before his case was called for setting." *Id.* at 814. In reaching this decision, the Court focused on the

"purpose" of the rule and the fact that "ample time" was available to find a new judge, rather than the technicalities of the statute. *Id.* at 813-14.

Additionally, in *State v. Hansen*, 107 Wn.2d 331, 728 P.2d 593 (1986), this Court acted pragmatically to effect the intent of the disqualification statute. In *Hansen*, defense counsel filed a timely notice of disqualification. *Id.* at 333-334. When the Court offered to find a new judge for the trial, defense counsel rejected this offer and admitted that his sole purpose in filing the notice was to obtain a continuance of the trial date. *Id.* Although the Court could have rigidly held to the rule that disqualification strips the trial court of its jurisdiction, this Court had little difficulty finding that the purpose of the notice of disqualification had been fulfilled, and that the defendant had "waived" any right to a change of judge through his litigation conduct. *Id.*

This background demonstrates that when interpreting the disqualification statute, this Court has prioritized fairness to litigants over rigid textualism.[2] It should again reject the notion that it must engage in

[2] Although all of the cases cited were decided before the 2017 amendment to the disqualification statute, there is no indication that the change was meant to overrule any longstanding legal principle or precedent. Indeed, the legislative report accompanying the bill noted only that the purpose of the legislation was to change the name of an "affidavit of prejudice" to a "notice of disqualification" and expand the "statutory list of non-discretionary rulings." Final Bill Report, SSB 5277 (2017). According to the House Bill Report, the judges who testified in support of the bill made

semantic formalism to reach the conclusion that an *ex parte* ruling by a judge forfeits the right of disqualification. Instead, this Court should continue to interpret RCW 4.12.050 as protecting a party's fundamental right to secure a single change of judge upon learning which judicial officer will be presiding over his or her trial.

III. BARRING DISQUALIFICATION DUE TO *EX PARTE* DISCRETIONARY RULINGS WOULD PROMOTE GAMESMANSHIP AND UNNECESSARILY RESTRICT THE RIGHT OF DISQUALIFICATION

Holding that an *ex parte* ruling by a judge terminates the right of disqualification could promote unethical behavior by litigants and lead to a significant restriction of the notice of disqualification. A party who wishes to keep a specific judge on a case would have a strong incentive to come up with a way for that judge to exercise discretion without notice to the other party. And even routine, mundane pre-trial rulings by a judge could result in the forfeiture of the right of disqualification. This Court should not interpret the statute in a way that creates incentives for litigation abuse and causes absurd results.

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clear that the legislation would provide "more of an opportunity to disqualify a particular judge." House Bill Report, SSB 5277 (2017).

A. Holding that any exercise of discretion forfeits the right of disqualification could lead to gamesmanship

There is no evidence that any legislator or jurist intended for the disqualification statute to encourage parties to engage in *ex parte* judicial contact to obtain a strategic litigation advantage. But the logic of the Superior Court ruling invites such abuse. Litigants might seek to "lock in" a judge or prevent opposing counsel from exercising his right to disqualification. The following situations could become commonplace if the logic of the Superior Court's ruling becomes the law in our state:

- A defense lawyer knows that the prosecutor is inclined to disqualify a certain judge. Immediately after a case is filed, the defense lawyer decides to file a subpoena for evidence to a third party. CrR 4.8(b)(2)(B) (permitting "ex parte motion(s)" related to subpoena issuance). The defense lawyer approaches the disfavored judge *ex parte* for judicial signature, and the judge exercises his "discretion" to order the third party to appear and present tangible evidence. The issuance of a subpoena is not covered by RCW 4.12.050, and the defense lawyer may now argue that the prosecutor is barred from filing a notice of disqualification.
- A prosecutor knows that a specific judge is disliked by the public defender in a county. The prosecutor submits a search warrant to

that judge, who exercises her "discretion" to find probable cause and sign the warrant. CrR 2.3(c) ("A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant."). The act of signing a search warrant is not referenced in RCW 4.12.050, so the prosecutor may now argue that the judge cannot be disqualified by defense counsel. *But see State v. Chamberlin*, 161 Wn.2d 30, 41, 162 P.3d 389 (2007) (postulating that a defendant might file a notice of disqualification against a judge who issued a search warrant)

- A civil litigant files a routine lawsuit. Upon learning that the assigned judge is particularly favorable to his cause, he immediately files an emergency *ex parte* motion for a temporary injunction. RCW 7.40.050 (injunctions may be granted without notice in cases of "emergency"). The judge exercises his "discretion" to deny the request and instead schedules a hearing on the subject. Again, because orders denying temporary restraining orders are not covered by RCW 4.12.050, the litigant may now argue that opposing counsel cannot file for disqualification.

Each of these scenarios—and myriad others that currently reside only the imagination of zealous advocates—may become defensible litigation tactics if the logic of the Superior Court's ruling prevails. This

Court should not interpret RCW 4.12.050 to permit, much less encourage, such gamesmanship.

B. Holding that any exercise of discretion not named in the statute forfeits the right of disqualification could result in innocuous decisions stripping litigants of the right of disqualification

While the Court should be particularly concerned with how RCW 4.12.050 might promote litigation abuse and improper *ex parte* contacts, it should also be mindful of how the logic of the Superior Court's ruling might elevate innocuous judicial administration into rulings that strip parties of the right of disqualification. The list of "non-discretionary" rulings contained in RCW 4.12.050 is only a fraction of the minor decisions a judge might make prior to a party receiving notice of what judge will handle the substantive aspects of his or her case. If the narrow reading of the statute advanced by the Superior Court prevails, judicial rulings made *ex parte* or without notice to either party would warp the scope of the notice of disqualification beyond recognition. Consider the following examples:

- A defense attorney seeks an order for an expert to assist with a mental evaluation for her client, and files an *ex parte* motion to seal the expert request. A judge with administrative responsibilities has to sign the order to seal the expert request, and

exercises "discretion" to file a sealing order. CrR 3.1(f) ("The motion may be made ex parte and, upon a showing of good cause, the moving papers may be ordered sealed by the court and shall remain sealed until further order of the court."). Because sealing orders are not specifically delineated in RCW 4.12.050, the parties may now be barred from filing a notice of disqualification against the judge who signed the order.

- A pro se litigant seeks to file a lawsuit and submits a declaration detailing her indigence. The judge reviewing her financial declaration exercises "discretion" to grant a waiver of the filing fee. GR 34 (a)(2) (applications for filing fee waiver must be reviewed by "judicial officer"). A filing fee waiver is not mentioned as a non-discretionary ruling in RCW 4.12.050, so the parties may have lost the right to disqualify a judge.
- A prosecutor learns that a recently-arrested defendant has been engaging in witness intimidation from jail and seeks an emergency, after-hours order from an "on-call" judicial officer to cut off his access to jail phone calls. Granting this order, which is not mentioned in the miscellany of judicial decisions covered by RCW 4.12.050, could be construed as forfeiting the defendant's right of disqualification.

The fact that RCW 4.12.050 permits disqualification after certain acts of judicial discretion does not mean that it authorizes terminating the right of disqualification through routine acts of judicial administration that occur *ex parte* or without notice to either party. This Court should not construe the statute to cause such a result.

CONCLUSION

The purpose of disqualification is to give each party to a lawsuit one opportunity to seek a change of the judge assigned to his or her case. For over a century, this Court has issued pragmatic rulings that protect this substantive right while discouraging litigation gamesmanship. This Court should decline to endorse the theory adopted by the Superior Court and advanced by the State that *ex parte* proceedings can serve as an effective end-run around the right of disqualification.

Respectfully submitted this 4th day of January, 2021.

s/Mark B. Middaugh
WSBA #51425
Attorney for Amicus Curiae WACDL
E-mail: mark@middaughlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2021, I uploaded a PDF copy of this brief to the E-Portal of the Washington Supreme Court, thus causing it to be served on each of the attorneys of record in this case.

s/Mark B. Middaugh
WSBA #51425
WACDL Amicus Committee
1511 Third Avenue, Suite 503
Seattle, WA 98118
(206) 919-4269
Mark@middaughlaw.com

MARK

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